

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RYDELL BOOKER,

Defendant-Appellant.

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UNPUBLISHED

April 12, 2007

No. 265364

Wayne Circuit Court

LC No. 04-006094-02

Before: Neff, P.J., and O’Connell and Murray, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession with intent to deliver 1,000 or more grams of cocaine, MCL 333.7401(2)(a)(i), and was sentenced to 12 to 30 years’ imprisonment.<sup>1</sup> He appeals as of right. We affirm.

I. Underlying Facts

On March 10, 2004, defendant and three codefendants were arrested in a house where the police found a substantial amount of drugs. Earlier, beginning at 8:10 p.m., a police officer conducted “pre-raid surveillance.” At approximately 8:30 p.m., the officer observed a man described as 6’2 to 6’4,” weighing 200 to 220 pounds, with a lighter to medium complexion, wearing a light-colored blue jean outfit and tennis shoes, come out of the house. The man got into an Impala that was parked in front of the house, and drove away. When the man returned at approximately 9:10 p.m., a woman, later identified as codefendant Ingrid Young, was following him in a separate vehicle, a Mercury. Codefendant Young parked in the driveway behind the Impala. The man walked to the driver’s side of the Mercury, codefendant Young took a Marshall Field’s shopping bag out of the car, and the man and codefendant Young walked to the side of the house together. No other vehicles arrived at the house before the raid.

At approximately 9:30 p.m., several officers simultaneously positioned themselves around the house to execute a search warrant. One officer testified that from his position on the

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<sup>1</sup> Defendant was acquitted of an additional charge of possession with intent to deliver less than five kilograms of marijuana, MCL 333.7401(2)(d)(iii).

side of the house, he saw four people seated at a table in the kitchen area.<sup>2</sup> When a different officer announced their presence and purpose, the officer outside the kitchen window saw the four individuals run toward the rear of the house. Another officer heard people running inside, moving toward the rear of the house.

Within one minute, the police gained entry after ramming the security gate and front door. One officer entering the house saw “more than two people” running out of the kitchen. According to the police, no one left the house although one unidentified man attempted to leave through a rear door, but was ordered back inside. Defendant was found in a rear bedroom, along with codefendants Young and Randall Walker. Defendant was the closest to the door and “nearest to the wall.” The police found two bags of powder cocaine between the wall and the bed. In the bedroom closet, the police found two smaller knotted plastic bags, one containing powder cocaine, and the other containing rock cocaine. The four bags weighed a total of 265.29 grams. Codefendant Manuel Randall was found hiding in a crawl space on the second floor, with \$1,485 strewn around him. There was no evidence indicating that any of the four defendants lived at the residence, and each defendant provided proof of other residency.

The police saw a trail of “large chunks” of cocaine on the floor going from the kitchen across the hallway into the bathroom. In total, that cocaine weighed 212.84 grams. In the toilet bowl, floating on a piece of newspaper, the police found a large chunk of cocaine that weighed 85.35 grams. An officer noted that the toilet bowl was filling, as though it had just been flushed. On the bathroom sink, next to the toilet, the police found a one-weight scale that contained cocaine residue. On the floor of the hallway closet, the police found four bricks of cocaine wrapped in black and clear plastic packaging underneath a jacket. One brick of cocaine weighed 989.99 grams, and the other three bricks weighed a total of 3,004.88 grams. There was also a large baggie containing 386.44 grams of marijuana, and a baggie containing 29.39 grams of marijuana.

In the kitchen, on a round table, the police found a chunk of cocaine that weighed 9.06 grams, a sifter, and black and clear plastic wrapping containing cocaine residue. Also on the table was a paper bag containing a photograph of defendant with the two male codefendants and additional photographs of codefendant Randall. The paper bag also contained several Ziploc baggies, which a narcotics officer testified are used for packaging cocaine. Nothing other than drugs and drug paraphernalia was found on the table.

On the floor next to the kitchen table was a Marshall Field’s bag containing codefendant Young’s driver’s license, baby clothes, and a children’s book. Also in the bag was a “brick of cocaine” that weighed 1,003.86 grams, wrapped in clear and black plastic wrapping similar to the plastic found on the kitchen table. Also in codefendant Young’s purse was 14.84 grams of loose marijuana.

The officer who performed the pre-raid surveillance did not participate in the raid. He testified that based on defendant’s characteristics, as compared to the other two male

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<sup>2</sup> The officer testified that the table was right in front of the kitchen window.

codefendants who were in the home, he could not exclude defendant as the man seen leaving the house and returning with codefendant Young shortly before the raid. At trial, police officers who participated in the raid provided descriptions of the three male defendants. Defendant was described as being 6'2" or 6'3," with a light to medium complexion, and wearing light-colored jeans, a light-colored leather jacket with stitching, and gym shoes. Of the four defendants, defendant had the lightest complexion, and was the largest in weight and height. Codefendant Randall was described as being 5'6" with a medium to dark complexion. While codefendant Walker was described as having a medium to dark complexion, and wearing a darker charcoal grey outfit.

## II. Bindover

Defendant first argues that the district court abused its discretion in binding him over for trial because the evidence presented at the preliminary examination was insufficient to establish that he possessed the drugs. Defendant claims that he was merely present in the house where the drugs were found.

Generally, this Court reviews a circuit court's decision to deny a motion to quash a felony information de novo to determine if the district court abused its discretion in ordering the bindover. *People v Orzame*, 224 Mich App 551, 557; 570 NW2d 118 (1997). But "[i]f a defendant is fairly convicted at trial, no appeal lies regarding whether the evidence at the preliminary examination was sufficient to warrant a bindover." *People v Wilson*, 469 Mich 1018; 677 NW2d 29 (2004); *People v Hall*, 435 Mich 599, 601-603; 460 NW2d 520 (1990). Here, defendant's argument fails because, as discussed in part IV(A) of this opinion, sufficient evidence at trial supported defendant's conviction. Consequently, defendant has failed to state a cognizable claim on appeal regarding the sufficiency of the evidence at the preliminary examination. *Id.*

## III. Effective Assistance of Counsel

We reject defendant's argument that defense counsel was ineffective for failing to introduce evidence or otherwise call him as a witness to establish that he is a licensed professional boxer and a heavyweight contender, and to explain his presence at the house. Defendant contends that this "additional evidence" would have supported his defense that he "was merely present because he knew these people and because of his position as a heavyweight contender, it was unreasonable to presume he was involved in narcotics."

Because defendant failed to raise this ineffective assistance of counsel issue in a motion for a new trial or an evidentiary hearing in the trial court, this Court's review is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

Effective assistance of counsel is presumed and the defendant bears a heavy burden of proving otherwise. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing norms and that the representation so prejudiced the defendant

that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Id.*

Decisions about what evidence to present and what witnesses to call are matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Ineffective assistance of counsel can take the form of a failure to call a witness or present other evidence only if the failure deprives the defendant of a substantial defense. *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990). A defense is substantial if it might have made a difference in the outcome of the trial. *Id.*

Defendant has not provided any evidence that he is a licensed professional boxer and a heavyweight contender. More importantly, the theory that defendant was merely present was presented to the jury, and given the weight of the evidence produced at trial, no reasonable likelihood exists that defendant would not have been convicted if defense counsel had introduced evidence that defendant was a professional boxer.<sup>3</sup> *Effinger, supra.*

To the extent that defendant relies on the fact that defense counsel's argument was not successful, nothing in the record suggests that defense counsel's presentation of the argument was unreasonable or prejudicial. Counsel's decision about how to present his argument to the jury was a matter of trial strategy. "This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *Rockey, supra* at 76-77. "The fact that defense counsel's strategy may not have worked does not constitute ineffective assistance of counsel." *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996).<sup>4</sup>

#### IV. Defendant's Supplemental Brief

##### A. Sufficiency of the Evidence

In a supplemental brief filed in propria persona, defendant first argues that there was insufficient evidence to sustain his conviction. We disagree.

When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court views the evidence in a light most favorable to the prosecution and determines whether a rational trier of fact could find that the essential elements of the crime were

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<sup>3</sup> Defendant acknowledges that defense counsel "argued that the prosecutor had failed to prove [defendant] had a sufficient nexus to the narcotics found at the house," and "challenged the testimony of the officer and the lack of evidence which showed defendant did not possess any narcotics."

<sup>4</sup> Defendant cursorily notes that there was no on-the-record waiver of his right to testify. However, this is of no consequence because although a criminal defendant has a fundamental constitutional right to testify at trial, US Const, Am XIV; Const 1963, art 1, §§ 17, 20, there is no requirement that there be an on-the-record waiver of a defendant's right to testify. *People v Harris*, 190 Mich App 652, 661-662; 476 NW2d 767 (1991); *People v Simmons*, 140 Mich App 681, 684; 364 NW2d 783 (1985).

proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). “[A] reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict.” *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

The elements of possession with intent to deliver 1,000 or more grams of cocaine are (1) the recovered substance was cocaine, (2) the cocaine was in a mixture weighing more than 1,000 grams, (3) the defendant was not authorized to possess the cocaine, and (4) the defendant knowingly possessed the cocaine with the intent to deliver it. MCL 333.7401(2)(a)(i); *Wolfe*, *supra* at 516-517. Defendant only argues that there was insufficient evidence that he possessed the controlled substances found in the home.

Possession of a controlled substance may be either actual or constructive, and may be joint as well as exclusive. *Wolfe*, *supra* at 519-520. Constructive possession exists when the totality of the circumstances indicates a sufficient nexus between the defendant and the contraband. *Id.* at 520. A person’s presence, by itself, at a location where drugs are found is insufficient to prove constructive possession. *Id.* Instead, some additional connection between the defendant and the contraband must be shown. *Id.* “The essential question is whether the defendant had dominion or control over the controlled substance.” *People v Konrad*, 449 Mich 263, 271; 536 NW2d 517 (1995). Circumstantial evidence and reasonable inferences arising from the evidence are sufficient to establish possession. *People v Fetterley*, 229 Mich App 511, 515; 583 NW2d 199 (1998).

At trial, the prosecutor advanced the theory that defendant was guilty as a principal or an aider and abettor. A person who aids or abets the commission of a crime may be convicted and punished as if he directly committed the offense. MCL 767.39. “To support a finding that a defendant aided and abetted a crime, the prosecution must show that (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement.” *People v Izarraras-Placante*, 246 Mich App 490, 495-496; 633 NW2d 18 (2001) (citation omitted).

“Aiding and abetting” describes all forms of assistance rendered to the perpetrator of a crime and comprehends all words or deeds that might support, encourage, or incite the commission of a crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999); *People v Rockwell*, 188 Mich App 405, 411-412; 470 NW2d 673 (1991). “The quantum of aid or advice is immaterial as long as it had the effect of inducing the crime.” *People v Lawton*, 196 Mich App 341, 352; 492 NW2d 810 (1992). An aider and abettor’s state of mind may be inferred from all the facts and circumstances, including a close association between the defendant and the principal, and the defendant’s participation in the planning or execution of the crime. *Carines*, *supra* at 758.

Viewed in a light most favorable to the prosecution, the evidence was sufficient for a rational trier of fact to conclude beyond a reasonable doubt that defendant either constructively possessed the cocaine or assisted others in possessing the cocaine. The evidence supported an inference that when the police arrived, defendant and the three other codefendants were in the

process of dividing and packaging a large amount of cocaine at the kitchen table. Immediately before the search, the police saw four people gathered around the kitchen table. When the police announced their presence, the four people fled toward the rear of the house. On the kitchen table in plain view was 9.06 grams of cocaine, a sifter, and black and clear plastic that contained cocaine residue. Also on the table was a paper bag containing several empty Ziploc baggies, which are used for packaging cocaine. Nothing other than drugs and drug paraphernalia was found on the table. A bag similar to one that codefendant Young and a man fitting defendant's description were seen carrying to the side of the house was immediately next to the kitchen table. The bag contained 1,003.86 grams of cocaine wrapped in the same black and clear plastic found on the kitchen table.

From the kitchen through the hallway into the bathroom was a significant trail of cocaine that weighed a total of 212.84 grams. In the bathroom, there was 85.35 grams of cocaine floating in the toilet, which appeared to have just been flushed, and a scale containing cocaine residue. In the hallway closet were four bricks of cocaine wrapped in black and plastic packaging that weighed a total of 3,994.87 grams.

Defendant was found in a nearby bedroom, along with codefendants Young and Walker. No lights or appliances were on inside the bedroom. Defendant was closest to the door and "nearest to the wall." The police found two additional bags of cocaine between the wall and the bed, and two smaller bags in the bedroom closet. The four bags weighed a total of 265.29 grams.

Although defendant claims that he was merely present, a jury could reasonably infer from defendant's actions, the amount of drugs found inside the house, and defendant's proximity to the drugs that defendant was involved in a drug trafficking operation and had joint constructive possession of the cocaine found in the home. Further, from the evidence presented at trial regarding defendant's description, a jury could reasonably infer that defendant was the man who left the house, returned in tandem with codefendant Young, and escorted codefendant Young into the house as she carried a bag containing a sizeable amount of cocaine.

In sum, sufficient circumstantial evidence was presented linking defendant to the cocaine found in the home to sustain defendant's conviction.

#### B. Great Weight of the Evidence

Defendant alternatively argues that the trial court abused its discretion in denying his motion for a new trial on the ground that the verdict was against the great weight of the evidence because there was no evidence that he possessed the drugs. We disagree.

This Court reviews a trial court's decision denying a motion for a new trial for an abuse of discretion. *People v Crear*, 242 Mich App 158, 167; 618 NW2d 91 (2000). In evaluating whether a verdict is against the great weight of the evidence, the question is whether the evidence preponderates heavily against the verdict so that it would be a miscarriage of justice to allow the verdict to stand. *People v Lemmon*, 456 Mich 625, 627; 576 NW2d 129 (1998). "A verdict may be vacated only when it 'does not find reasonable support in the evidence, but is more likely to be attributed to causes outside the record such as passion, prejudice, sympathy, or some extraneous influence.'" *People v DeLisle*, 202 Mich App 658, 661; 509 NW2d 885 (1993) quoting *Nagi v Detroit United Railway*, 231 Mich 452, 457; 204 NW 126 (1925).

For the reasons discussed in part IV(A) of this opinion, the verdict is not against the great weight of the evidence. The evidence does not clearly preponderate so heavily against the verdict that a miscarriage of justice would result if the verdict was allowed to stand. *Lemmon, supra*. The trial court did not abuse its discretion in denying defendant's motion.

Affirmed.

/s/ Janet T. Neff

/s/ Peter D. O'Connell

/s/ Christopher M. Murray